Supreme Court, U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975
No. 75-517

WAYNE McARTHUR MACE,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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September 29, 1975

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	PAGE
Petition for a Writ of Certiorari	1
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Constitutional Provisions Involved	6
Statement of the Case	7
Reasons for Granting the Writ	12
Conclusion	22
Appendix A (Opinion of the Pennsylvania Superior Court)	23
Appendix B (Concurring Opinion in the Pennsylvania Superior Court)	35
Appendix C (Opinion of Dauphin County Court)	37
Appendix D (Order of the Supreme Court of Pennsylvania Denying Petition for Allowance of Appeal)	47

TABLE OF CITATIONS

CASES:

Ashe v. Swenson, 397 U.S. 436 (1970)	20
Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842 (4th Cir., 1964)	17
Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)	19, 20
Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)	12, 13, 14, 18, 22

Commonwealth v. Barry Graham Page, 451 Pa. 331, 303 A. 2d 215 (1973) 7

Commonwealth v. Beam, 227 Pa. Superior Ct. 293, 324 A. 2d 549 (1974) 20

Commonwealth v. Campana, 452 Pa. 233, 304 A. 2d 432 (1973) 20

Commonwealth v. Richbourg, 442 Pa. 147, 275 A. 2d 345 (1971) 20

Doe v. Bolton, 93 S. Ct. 739, 410 U.S. 179, 35 L. Ed. 2d 201 (1973) 7

People v. Hitch, 113 Cal. Rptr. 158, 520 P. 2d 974 (1974) 15, 16

Poole v. State, 291 So. 2d 723 (Miss. 1974) 17

Roe v. Wade, 93 S. Ct. 705, 410 U.S. 113, 35 L. Ed. 2d 147 (1973) 7

Seattle v. Fettig, 10 Wash. App. 773, 519 P. 2d 1002 (1974) 16, 17

State v. Brown, 262 Or. 442, 497 P. 2d 1191 (Ore. S. Ct. 1972) 20

United States v. Bryant, 439 F. 2d 642 (D.C. Cir. 1971), on remand 331 F. Supp. 927, aff. 448 F. 2d 1182 .....14, 15

United States ex rel. Paxos v. Rundle, 337 F. Supp. 315 (1971) 17

OTHER AUTHORITIES:

Act of June 3, 1911, P. L. 639, Sec. 2, as amended, 63 P.S. Sec. 401(a) 8

Act of June 24, 1939, P. L. 872:

Sec. 703, 18 P.S. Sec. 4703 (now 18 P.S. Sec. 2504) 8

Sec. 719, 18 P.S. Sec. 4719 ..... 4, 7

"Criminal Procedure: Government Has Duty To Implement Guidelines To Preserve Discoverable Evidence," 1971 Duke L.J. 644 (1971) 15

28 U.S.C. Section 1257(3) 3

United States Constitution:

Fifth Amendment 4, 5, 6, 19, 20, 21

Sixth Amendment 21

Fourteenth Amendment 4, 6, 19

IN THE SUPREME COURT OF THE UNITED STATES

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No.

WAYNE McARTHUR MACE,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Wayne McArthur Mace, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Superior Court of Pennsylvania rendered in these proceedings on June 24, 1975.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania, as yet unreported appears at Appendix A, infra, pp. 23-34, with the concurring opinion appearing at Appendix B, infra, pp. 35-36. The opinion of the Court of Common Pleas of Dauphin County is reported at 96 Dauphin 350 (1974), and appears at Appendix C, infra, pp. 37-46. The Supreme Court of Pennsylvania denied the petitioner's petition for allowance of appeal by order dated September 18, 1975, appearing at Appendix D, infra, p. 47.

JURISDICTION

The opinion and judgment of the Superior Court of Pennsylvania were entered on June 24, 1975. The order of the Pennsylvania Supreme Court denying petitioner's petition for allowance of appeal was entered on September 18, 1975. See Appendix D, p. 47, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

The petitioner was the defendant in a criminal case wherein he was charged with abortion causing death under the Pennsylvania Act of June 24, 1939, P. L. 872, §719, 18 P.S. §4719. This act was subsequently held to be unconstitutional by the Supreme Court of Pennsylvania. The District Attorney then commenced prosecution on new and different charges, to wit: involuntary manslaughter and practicing of medicine without a license. In addition, prior to the preliminary hearing on the original charge of abortion causing death, the autopsy tissue samples taken from the body of the deceased were destroyed by the Commonwealth after their examination by the Commonwealth's pathologist thereby precluding the petitioner's medical expert from making an independent evaluation of them. The conclusions of the Commonwealth's medical examiners comprised the totality of the Commonwealth's proof as to cause of death. The questions thereby arising are:

1. Was the petitioner denied due process of law under the Fifth and Fourteenth Amendments of the United States Constitution because the Commonwealth permitted destruction of various autopsy specimen tissues, thereby precluding the petitioner's medical expert from making an independent evaluation of them, where the tissues had been analyzed by the Commonwealth's medical examiners whose conclusions comprised the totality of the Commonwealth's proof as to cause of death? More specifically:

(a) When the Commonwealth anticipates offering testimony based on physical evidence, does it have a duty to preserve that evidence so it can be made available for pre-trial discovery and/or production at trial?

(b) If so, what remedy is available to the accused when this duty has been breached?

(c) Does a breach of this duty constitute mere harmless error when the totality of the Commonwealth's proof as to cause of death consists of the conclusions of medical examiners on the basis of their analysis of the since destroyed evidence?

2. Was the petitioner placed in double jeopardy, in violation of the Fifth Amendment of the United States Constitution, by virtue of the fact that the Commonwealth procured an indictment for new and different charges, arising out of the same alleged incident, after the statute under which the original indictment was brought was found to be unconstitutional, and by virtue of the Commonwealth's failure to bring all known charges against the petitioner in a single proceeding?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

Constitution of the United States, Amendment V:

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

The petitioner was the defendant in a case which originated in the Court of Common Pleas of Dauphin County at No. 843 Criminal Division, 1972, wherein he was charged with abortion causing death under the Act of June 24, 1939, P. L. 872 §719, 18 P.S. §4719. A preliminary hearing on this charge was held on January 24, 1972, and he was subsequently indicted on this charge on March 15, 1972. The case was held in abeyance by mutual agreement of the District Attorney and attorney for petitioner pending determination of the constitutionality of the statute under which petitioner was charged. On March 29, 1973, the Supreme Court of Pennsylvania handed down an opinion in the case of *Commonwealth v. Barry Graham Page,* 451 Pa. 331, 303 A.2d 215 (1973), declaring that the Pennsylvania Abortion Causing Death Statute, the Act of June 24, 1939, P. L. 872 §719, 18 P.S. §4719, was unconstitutional.

On April 11, 1973, the petitioner filed a motion to quash the indictment alleging that the statute under which he was charged was unconstitutional under the doctrine set forth by the Pennsylvania Supreme Court in *Commonwealth v. Page,* supra, and the Supreme Court of the United States in *Roe v. Wade,* 93 S. Ct. 705, 410 U.S. 113, 35 L. Ed. 2d 147 (1973), and *Doe v. Bolton,* 93 S. Ct. 739, 410 U.S. 179, 35 L. Ed. 2d 201 (1973). Shortly thereafter, almost two years after the filing of the original complaint, the District Attorney commenced prosecution

on new and different charges, to wit, involuntary manslaughter in violation of the Act of June 24, 1939, P. L. 872 §703, 18 P.S. §4703 (now 18 P.S. §2504), and practicing of medicine without a license in violation of the Act of June 3, 1911, P. L. 639 §2, as amended, 63 P.S. §401 (a). These charges were docketed in the Court of Common Pleas of Dauphin County at Nos. 1136 Criminal Division, 1973 and 1137 Criminal Division, 1973, respectively. On July 10, 1973, petitioner was indicted by the Grand Jury for these two charges. These charges and indictments arose out of the same alleged single criminal episode as did the charge of abortion causing death, to wit, the abortion allegedly performed on Mrs. Mildred Maley on August 15, 1971.

On August 14, 1973, petitioner filed an application for allowance of pre-trial discovery requesting that a forensic pathologist of his choice be permitted to examine autopsy tissue samples taken from the body of the deceased, Mildred Maley (R. 7a-8a). The District Attorney filed an answer to the application averring that the samples had been destroyed three weeks after their examination by a pathologist employed by the Commonwealth (ten days prior to the preliminary hearing on the original charge) (R. 11a-12a). Accordingly, on September 25, 1973, appellant filed an application to quash indictments, averring as follows:

> "(a) These charges are based upon the alleged act of performing an abortion resulting in death and the indictments must be quashed by reason of the abortion statute having been declared unconstitutional.... [Citation omitted.]

> "(b) These charges are lesser offenses under the charge of abortion causing death and cannot be tried while the Motion to Quash Indictment is pending.
>
> "(c) The District Attorney is required to bring all known charges against the defendant arising from a single criminal episode in a single proceeding. The filing of the subsequent indictments violates the Double Jeopardy Clause of Pennsylvania and United States Constitutions . . . [Citation omitted.]
>
> "(d) The destruction of the autopsy samples deprives defendant of the opportunity to adequately prepare a defense and thereby violates his right to Due Process of Law." (R. 14a-16a)

This motion was denied.

On October 1, 1973, the original charge of abortion causing death was dismissed. The petitioner was tried on the charges of involuntary manslaughter and practicing of medicine without a license in a jury trial which commenced on October 2, 1973, the Honorable Richard B. Wickersham presiding. At the trial, the Commonwealth sought to introduce the testimony of the toxicologist and pathologist who had analyzed various tissues taken from the body of the deceased and arrived at certain conclusions as to the cause of death. Petitioner's attorney objected to the admission of such testimony into evidence because the Commonwealth had permitted the destruction of these tissues, forever precluding petitioner's medical expert from making an individual evaluation of them (R. 217a). This objection was overruled (R. 219a, 268a). The Com-

monwealth's medical examiners' conclusions comprised the totality of the Commonwealth's proof as to the cause of death.

The Commonwealth proceeded under the theory of misdemeanor manslaughter; i.e. that death occurred during the perpetration of the unlawful act of practicing medicine without a license. At the conclusion of the prosecution's case, the charge of practicing medicine without a license was dismissed. Petitioner's demurrer to the charge of involuntary manslaughter was overruled (R. 294a-295a). On October 9, 1973, petitioner was found guilty of the charge of involuntary manslaughter.

The petitioner filed motions for new trial and in arrest of judgment, which averred, in part:

"6. The Court erred in not quashing the indictment because the Abortion Causing Death Statute has been declared unconstitutional. . .

"8. The Court erred in not quashing the indictment for the reason that the defendant has been placed in double jeopardy as all charges arising from the same occurrence must be brought together.

"9. The Court erred in not quashing the indictment because the autopsy samples taken from the body of the deceased were destroyed by the Commonwealth. . .

"12. The Court erred in overruling the defendant's objection to expert medical testimony presented by the Commonwealth as to the cause of death after it was established that the evidence upon which said opinions were based were [was] destroyed."

These motions were denied by the lower Court on October 17, 1973 (R. 412a through 416a). The lower Court later filed an opinion regarding its denial of the petitioner's motions. This opinion appears as Appendix C, infra, pp. 37-46. The petitioner was sentenced for an indefinite term, the minimum of which was to be one and one-half years and the maximum of which was to be three years imprisonment and to pay a fine of $2,000.00

The petitioner appealed from the judgment of sentence to the Superior Court of Pennsylvania to No. 114 March Term, 1974. The Superior Court affirmed the judgment in an opinion filed on June 24, 1975, which appears as Appendix A, infra, pp. 23-34. Two Judges concurred in a separate opinion, appearing as Appendix B, infra, pp. 35-36. The petitioner then timely filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. Said petition was denied by order dated September 18, 1975, appearing as Appendix D, infra, at p. 47. Whereupon, the instant petition for writ of certiorari was filed with this Honorable Court.

REASONS FOR GRANTING THE WRIT

1. The Pennsylvania Superior Court's Opinion Directly Conflicts With the Due Process Principles Enunciated by This Honorable Court in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), as Well as Construction of the Due Process Clause by High Courts in a Number of Jurisdictions

Both the lower Court and the Pennsylvania Superior Court, in addressing themselves to the issue of the destroyed autopsy specimens, based their judgments on an assessment of whether such destruction was done "in good faith" by the Commonwealth. The lower Court justified its allowing of the Commonwealth's experts' conclusions into evidence and its failure to quash the indictment by noting:

> ". . . the autopsy specimens were destroyed *in good faith* and in accord with the *normal practice* of the National Medical Services Lab, Willow Grove, Pennsylvania. The tissues were destroyed on January 14, 1972—almost six months after Mrs. Maley's death." * Appendix C, infra, p. 44. (Emphasis supplied.)

* It should be pointed out, however, that the initial preliminary hearing on the charge of abortion causing death was held on January 24, 1972, so that the tissues were destroyed before the preliminary hearing and before the petitioner had any opportunity to initiate discovery proceedings.

And the majority of the Superior Court, after summarizing the history of the case in the opinion, concluded:

> "When all these factors are taken into consideration, it is apparent that the Commonwealth has not overborne the defendant by secretly amassing evidence or designing a case unfairly weighted against him. The *good faith* of the Commonwealth is attested to by the willingness with which it agreed at the hearing to make available its evidence and witnesses relevant to the cause of death." Appendix A, infra, pp. 31-32. (Emphasis supplied.)

Such considerations of "normal practice" and "good faith" are irrelevant to a determination of whether the Commonwealth's failure to retain the evidence deprived the petitioner of his constitutional right to due process.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), this Honorable Court considered a situation in which a defendant being tried for murder requested, through his attorney, any statements made by his companion in the alleged crime. While some of the statements were made available to him, one statement in which the companion admitted the actual homicide was withheld by the prosecution. The majority opinion, written by Justice Douglas, stated as follows:

> "We agree with the Court of Appeals that suppression of this confession was a violation of the Due-Process Clause of the Fourteenth Amendment . . . 373 U.S. at 86, 83 S. Ct. at 1196, 10 L. Ed. 2d at 218.
>
> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon

> request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*" 373 U.S. at 87, 83 S. Ct. at 1196-1197, 10 L. Ed. 2d at 218. (Emphasis supplied.)

Clearly, the opinions of the lower Court and the Superior Court in the case at hand are in direct conflict with this Honorable Court's holding cited supra.

It might be argued that the fact that the evidence in the case at hand was destroyed and that there is no proof that it would have been favorable to the petitioner takes it outside of the holding in *Brady*. It is respectfully submitted that, if anything, such circumstances present an even clearer case for relief, for the petitioner was forever precluded from knowing whether the evidence was favorable or not. Indeed, to uphold the lower and Superior Courts' holdings on this basis would be to hand the prosecution on a silver platter a convenient method by which to avoid sharing favorable evidence with an accused—merely by having a standard practice of allowing destruction of all physical evidence.

The Court of Appeals for the District of Columbia Circuit has held that the duty to disclose evidence is operative as a duty of preservation upon the Government and that judicial sanctions will be imposed where disclosure is impossible, due to loss of discoverable evidence, unless the Government attempted, through adherence to rigorous and systematic procedure, to preserve all discoverable evidence amassed during criminal investigation. *United States v. Bryant*, 439 F. 2d 642 (D.C. Cir. 1971), on remand 331 F. Supp. 927, aff. 448 F. 2d 1182. The court

reasoned that if the duty to disclose were invocable only when the contents of the undisclosed evidence was already known, the duty could be circumvented by destroying the evidence rather than refusing to reveal it. Note, "Criminal Procedure: *Government Has Duty To Implement Effective Guidelines To Preserve Discoverable Evidence,*" 1971 Duke L.J. 644 (1971).

Both the lower Court and the Superior Court in the case at hand attempted to distinguish *Bryant*, supra, by asserting that it did not deal with the constitutional right of due process, but rather that it was decided on statutory grounds, to wit: the Jencks Act and the Federal Rules of Criminal Procedure (Appendix C, infra, p. 44, and Appendix A, infra, p. 27). This distinction is without merit. The Honorable Skelly Wright specifically stated, at page 647 of the *Bryant*, supra, opinion:

> "Access by defense counsel to certain evidence gathered by the Government is protected by both *constitutional and statutory safeguards* in the federal criminal process." (Emphasis added.)

He continued, noting that a series of United States Supreme Court decisions "creates a due process requirement that certain materials be disclosed to the defendant" (p. 647).

Courts in several jurisdictions have considered the problem presented by destroyed evidence. In *People v. Hitch*, 113 Cal. Rptr. 158, 520 P. 2d 974 (1974), the Supreme Court of California stated the following, at pp. 161, 977:

> ". . . in cases involving tests, such as the breathalyzer test, administered by the police, the state has

> control of the evidence; and the defendant is dependent on the state for its production. Accordingly, once a showing has been made that it is reasonably possible that evidence with respect to the test could assist the defense, due process requires that it be produced or the results of the test suppressed, unless it is shown that the items which were destroyed could not have been preserved without unreasonable effort."

In the case at hand, the petitioner's expert witness testified at the pretrial discovery hearing that it would be impossible to adequately make an independent determination of the cause of death without an examination of the autopsy specimen tissues (R. 9b). Such testimony clearly constitutes a showing that "it is reasonably possible that evidence . . . could assist the defense". *Hitch* pp. 161, 977, quoted supra.

In *Seattle v. Fettig*, 10 Wash. App. 773, 519 P. 2d 1002 (1974), the Court of Appeals of Washington promulgated a similar opinion. In that case, the evidence (a video tape) was destroyed by the police, not by the district attorney. This is analogous to the case at hand wherein the evidence was destroyed by the Medical Services Laboratory. The Washington Court quickly dismissed this distinction as irrelevant. It stated, at p. 1004:

> "Although the police destroyed the video tape, their acts are chargeable to the prosecutor; the suppression therefore was 'by the prosecution. . .'" (Footnote omitted.)

The court went on to say:

> "Moreover, that the suppression was negligent rather than deliberate is not material here; the defendant's due process rights are affected in either case." P. 1004

In the case at hand the autopsy specimens were deliberately destroyed and the Commonwealth made no showing that their destruction was necessary to and concomitant with the testing done by their medical examiners. See *Poole v. State*, 291 So. 2d 723 (Miss 1974). Nor did the Commonwealth prove that it would have been impractical or burdensome to preserve the tissues. They were stored by the Commonwealth for purposes of analysis in two containers: one containing a variety of specimens; the other, the uterus and attached tissues (R. 217a).

The case of *United States ex rel. Paxos v. Rundle*, 337 F. Supp. 315 (1971), decided in 1971 by the United States District Court, Eastern District of Pennsylvania, concerned a similar issue. The court concluded that the district attorney's statement to defense counsel that the bookkeeper (whose payroll records contradicted inculpatory time sheets) would not be called as a rebuttal witness "effectively foreclosed (defense counsel) from ever introducing these matters into evidence", p. 318, because defense counsel reasonably inferred that the issue of the time sheets would not be raised. The district attorney's reference to the time sheets in closing argument was found, by the court, to have denied the defendant his right to a fair trial.

The case at hand is directly analogous to the *Rundle* case, supra. In both cases, the prosecution effectively foreclosed the defendant from presenting evidence which might have led the jury to entertain a reasonable doubt as to guilt. See also *Barbee v. Warden, Maryland Penitentiary*, 331 F. 2d 842 (4th Cir., 1964).

The concurring judges of the Superior Court in the case at hand recognized that when the prosecutor anticipates offering testimony based on physical evidence, he has a duty to preserve that evidence. Appendix B, infra, pp. 35-36. They, however, concluded that the failure to preserve the autopsy specimens constituted harmless error. Such a conclusion is patently unjustified because the opinions of the prosecution witnesses based upon their examination of the specimens comprised the totality of proof as to cause of death.

The Pennsylvania Superior Court's (and the lower Court's) opinion directly conflicts with the due process principles enunciated by this Honorable Court in *Brady v. Maryland,* supra, as well as construction of the Due Process Clause by high courts in a number of jurisdictions regarding the prosecution's duty to make evidence available to the accused. In addition, this case presents the heretofore unanswered question of what remedy is available to a defendant when the Commonwealth has breached its duty to preserve evidence. The answer to this question is of utmost importance to prosecutors, defense attorneys, defendants, and trial judges. For these reasons, the petition for writ of certiorari should be granted.

2. The Circumvention of an Unconstitutional Statute Through a Much Later Prosecution of Totally Different Charges for the Same Event Presents an Important Question of Interpretation of the Double Jeopardy Clause of the United States Constitution Which Has Not Heretofore Been Determined by This Honorable Court

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On August 26, 1971, the petitioner was charged in a criminal complaint with committing the offense of abortion causing death. The case was held in abeyance by mutual agreement of the district attorney and attorney for the petitioner pending determination of the constitutionality of the statute under which the petitioner was charged. Because the statute was subsequently held to be unconstitutional, the Commonwealth failed to prosecute the charge and, instead, on July 10, 1973, without the filing of new criminal complaints, procured Grand Jury indictments for the offenses of involuntary manslaughter and practicing medicine without a license. These indictments arose out of the same alleged criminal episode as did the charge of abortion causing death, to wit, the abortion allegedly performed on Mrs. Mildred Maley on August 15, 1971. This failure by the Commonwealth to bring in a single proceeding all three charges arising from this alleged episode placed the appellant in double jeopardy in violation of the Fifth Amendment of the Constitution of the United States.

The United States Supreme Court on June 23, 1969, held that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution was applicable to the States through the Fourteenth Amendment. *Benton*

v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). Subsequently, the Pennsylvania Supreme Court held that this constitutional protection against double jeopardy "requires a prosecutor to bring, in a single proceeding, all known charges against a defendant arising from a 'single criminal episode' ". *Commonwealth v. Campana*, 452 Pa. 233, 253, 304 A. 2d 432, 441 (1973). Mr. Justice Roberts wrote a very comprehensive opinion in that case citing both case law and proposals of the A.L.I. and A.B.A. An identical interpretation of the Double Jeopardy Clause was made in *State v. Brown*, 262 Or. 442, 497 P. 2d 1191 (Ore. S. Ct. 1972). More recently, the Pennsylvania Superior Court held that the rule of *Commonwealth v. Campana*, quoted supra, should be applied only in those cases in which the first prosecution is brought after the date that case was decided. *Commonwealth v. Beam*, 227 Pa. Superior Ct. 293, 324 A. 2d 549 (1974). This holding is inconsistent with prior decisions of the Supreme Courts of both the United States and Pennsylvania. In *Ashe v. Swenson*, 397 U.S. 436, 437, n. 1 (1970), the Supreme Court of the United States held that the double jeopardy prohibition was fully retroactive, and this holding was adopted in Pennsylvania in the case of *Commonwealth v. Richbourg*, 442 Pa. 147, 275 A. 2d 345 (1971). Retroactivity of the double jeopardy prohibition mandates that the rule set forth in *Commonwealth v. Campana*, supra, be applied to cases in which the first prosecution was brought prior to the date of that decision, such as the case at hand.

The question of whether the Double Jeopardy Clause requires that a prosecutor bring, in a single proceeding, all known charges against a defendant arising from a single criminal episode has not heretofore been considered by this Honorable Court. Because it is a question of considerable importance to the mechanism of the criminal justice system, the writ of certiorari should be issued.

The Pennsylvania Superior Court expressed the opinion that the Double Jeopardy Clause did not apply in the case at hand because the proceedings had only advanced to the indictment stage, and no trial had commenced. This holding illustrates the need for clarification of the Double Jeopardy Clause by this Honorable Court. In addition, it is respectfully submitted that such a holding is patently unjust in the case at hand where the petitioner's attorney agreed to forego the petitioner's right to a speedy trial (United States Constitution, Amendment VI) pending determination of the constitutionality of the statute under which the petitioner was charged. Waiver of this right was done in full reliance upon the expectation that no later, different charges would be brought for the same alleged criminal episode.

Whatever the petitioner's alleged acts may have been labeled: involuntary manslaughter, or practicing medicine without a license, the fact is that he was tried and convicted of performing an abortion which resulted in death. The fact that the abortion causing death statute was found to be unconstitutional barred the subsequent prosecution for involuntary manslaughter. For the foregoing reasons, the petition for writ of certiorari should be granted.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Superior Court of Pennsylvania for two reasons. First, the Superior Court's opinion is in direct conflict with the due process principles enunciated by this Honorable Court in *Brady v. Maryland*, supra, as well as construction of the due process clause by high courts in a number of jurisdictions. Second, the circumvention of an unconstitutional statute through a much later prosecution of totally different charges for the same event presents an important question of interpretation of the double jeopardy clause which has not heretofore been determined by this Honorable Court.

Respectfully submitted,
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COOPER, FRIEDMAN & BUTLER,
Counsel for Petitioner

APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA
Harrisburg District

No. 114 March Term, 1974

Commonwealth of Pennsylvania

v.

Wayne McArthur Mace,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Dauphin County, at No. 1136 C.D. of 1973.

Opinion by Jacobs, J., filed Jun 24, 1975:

The present case is before us due to the death of a woman from a bungled abortion attempt, committed before these operations were legally available. Appellant Wayne Mace was found guilty of involuntary manslaughter by a jury in connection with this death. He now appeals, alleging denial of due process because he was unable to examine independently certain autopsy specimens, and

error of the lower court in failing to dismiss the charge of involuntary manslaughter when it was determined that the Commonwealth could not prevail on a misdemeanor manslaughter theory.[1] We find these contentions without merit and therefore affirm.

The record reveals that the incidents surrounding the victim's death were as follows. In the early evening of August 15, 1971, when Mrs. Maley said goodnight to her husband and children, she was in excellent health. Later that night, she called her friend and employer, Mr. Anthony, from the Mace residence, requesting help. At Mr. Anthony's arrival, Mrs. Maley appeared pale and ill, and moments later collapsed, unconscious. Mr. Anthony promptly called his doctor, then put Wayne Mace on the

[1] Appellant also argues the failure of the lower court to quash the indictment due to the unconstitutionality of the criminal statutes dealing with abortion under which he was originally indicted. [The Act of June 24, 1939, P. L. 872 §718, Abortion, and §719, Abortion causing death, 18 P.S. §§4718, 4719 (printed at 18 Pa. C.S. App. at 324 and 330) was declared unconstitutional in Commonwealth v. Page, 451 Pa. 331, 303 A.2d 215 (1973)]. We know of no rule of law, however, which would prevent the Commonwealth from procuring an indictment for involuntary manslaughter simply because the original indictment was brought under a statute found unconstitutional in the interim. No principle of double jeopardy, or multiple prosecutions, can bar such a procedure since the defendant is not put in jeopardy until the actual trial is commenced. See Commonwealth v. Smith, Pa. Superior Ct. , 334 A.2d 741 (1975); Commonwealth v. Culpepper, 221 Pa. Superior Ct. 472, 293 A.2d 122 (1972). In this case, proceedings had only advanced to the indictment stage and appellant was not yet placed in jeopardy. Consequently, the Commonwealth was not barred from seeking another indictment.

line to explain Mrs. Maley's condition.[2] According to the doctor's testimony, the appellant informed the doctor that he had injected the victim with 30 or 40 cc's of potassium iodide to procure an abortion, and that she had apparently gone into shock. The victim was subsequently removed to a hospital where she died on August 18, 1971, without regaining consciousness.

Five different doctors and a toxicologist testified at trial as to the physical cause of death. Upon her admission to the hospital, the victim's condition was diagnosed as that of shock, a broad medical term which does not comprehend specific causes. See Dorland's Illustrated Medical Dictionary, 1374 (24th ed. 1965). At her death, the cause was recorded as shock status, cause unknown. An autopsy revealed the abdominal cavity full of two pints of loose blood. The hemorrhaging was due to the necrosis of tissue (death of tissue prior to death of the patient) in various reproductive organs. The body of the victim also evidenced severe damage to the lungs and brain. Portions of all these organs, as well as fluids from the body, were removed for further analysis. Tissue from the organs was preserved in paraffin to make it possible to cut microscopic slides.

Chemical analysis of the autopsy specimens revealed the presence of potassium iodide in various concentrations throughout the body. A medical expert stated that potassium iodide was a corrosive substance when it is in a concentrated state and gave the opinion that the chemical had

[2] Appellant Wayne Mace lives with his father in the lodging and garage facility which the elder Mr. Mace runs. Wayne has studied embalming for a year.

been injected into the victim's system in such a strong concentration as to cause cardiac arrest and general collapse of the circulatory system, and to coagulate the protein molecules in the body tissue, thus creating massive hemorrhaging. In the doctor's opinion, the specific cause of Mrs. Maley's death from shock was the introduction of a strong concentration of potassium iodide into her system.

Appellant first argues that he was entitled to an independent medical expert's evaluation of the autopsy specimens to determine cause of death. It is undisputed that the actual tissue and other autopsy specimens removed during the autopsy were destroyed on January 14, 1972, by the laboratory where they had been analyzed.[3] Appellant's argument is based on the discovery rights available to a defendant under Pa. R. Crim. P. 310, which provides that discovery of evidence, other than written statements of the defendant, can be ordered upon timely application by a defendant when exceptional circumstances and compelling reasons have been shown to exist.[4] It is his position that because the prior destruction of the

[3] It appears that some of the paraffin imbedded tissues from which slides were cut was retained and made available for discovery.

[4] Pa. R. Crim. P. 310 provides in part as follows: "All applications of a defendant for pretrial discovery and inspection shall be made not less than five days prior to the scheduled date of trial. The court may order the attorney for the Commonwealth to permit the defendant or his attorney and such persons as are necessary to assist him, to inspect and copy or photograph any written confessions and written statements made by the defendant. No other discovery or inspection shall be ordered except upon proof by the defendant, after hearing, of exceptional cirumstances and compelling reasons."

physical evidence made discovery under the rule impossible, he was denied his constitutional right of due process.

To support this contention, appellant cites United States v. Bryant, 439 F. 2d 642 (D.C. Cir. 1971), on remand, United States v. Bryant, 331 F. Supp. 927 (D.D.C. 1971), aff'd, United States v. Bryant, 448 F. 2d 1182 (D.C. Cir. 1971). That case concerns a tape recording of a conversation between the defendant suspected of dealing in narcotics, and the agent who was his primary accuser at trial. The defendant requested discovery of the tape but was informed that it was lost. The Bryant court held that, in order to give full effect to the Federal Rules of Criminal Procedure dealing with discovery,[5] "before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation." United States v. Bryant, supra at 651. When evidence is shown to be crucial to the defense, the prosecuting office has a burden of either producing it or explaining why it cannot do so. Thus the circumstances of the loss or destruction of evidence become relevant to determining whether sanctions for nondisclosure should be imposed on the prosecution. The court indicated that to satisfactorily carry its burden of explanation in the event of lost evidence, the prosecution must prove "earnest efforts" to preserve and, upon request, find evidence. The court recognized that earnest efforts could be proven where evidence was dstroyed in good faith, according to routine practices which adequately protected the rights of the accused.

The Bryant court relied primarily on two Supreme Court opinions for its decision: Brady v. Maryland, 373

[5] The holding of this case is based on Fed. R. Crim. P. 16 and the Jencks Act, 18 U.S.C. §3500 (1969).

U.S. 83 (1963), and United States v. Augenblick, 393 U.S. 348 (1969). In Brady, where a statement of the appellant's co-defendant had been withheld by the prosecution despite the appellant's request, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, supra at 87. A new trial was granted. In United States v. Augenblick, supra, the tape of the interrogation of a witness was lost prior to the request for discovery. It was held, however, that the government met its burden in explaining its failure to produce the evidence. Testimony was heard from a number of witnesses concerning the interrogation, the manner in which such tapes were customarily handled, and the fate of the subject tapes. Furthermore, the Court stated that the issue involved a federal rule of evidence which was not of constitutional significance and was not to be extended to state criminal trials.[6]

The Augenblick and Bryant decisions specifically concern, as does the present case, the loss of discoverable evidence by the prosecution prior to the discovery request. Although they are not controlling on this Court, since they do not define a policy of constitutional dimensions but merely interpret federal rules relating to discovery, the foundations of those opinions rest on the same policy that

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[6]The decision involves the application of the Jencks Act, 18 U.S.C. §3500 (1969), as does the decision in United States v. Bryant, 439 F. 2d 642 (D.C. Cir. 1971). See note 5, supra. The Jencks Act provides for the discovery of statements made by witnesses testifying against the defendant.

is expressed in Brady v. Maryland, supra, and has always been recognized by this Commonwealth. The Supreme Court stated its concern as follows: "Society wins not only when the guilty are convicted but when criminal trials are fair. . . . A prosecution that withholds evidence on demand of an accused . . . helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile' . . . ." Brady v. Maryland, supra, at 87-88. The Pennsylvania Supreme Court has discussed the function of the prosecutor in a like manner: "The interests of the Commonwealth do not require that a district attorney should win every case, but rather that justice should be done. The state has an interest in seeing that the innocent not be wrongfully punished, as well as in convicting the guilty." Lewis v. Lebanon Court of Common Pleas, 436 Pa. 296, 300-301, 260 A.2d 184, 187 (1969). See also ABA Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial §2.4 (Approved Draft, 1970).

Pennsylvania's rule conferring the right of pretrial discovery on the defendant is narrowly restricted to inspection of statements made by the defendant. Other evidence must be shown to be the subject of "exceptional circumstances and compelling reasons" to be discoverable. See Pa. R. Crim. P. 310. Under the influence of Brady v. Maryland, supra, however, it would appear that discovery of all evidence under this rule is becoming progressively more available and the courts of this Commonwealth are evolving the concept that a duty is imposed on

the prosecution not to make requested evidence valuable to the defense permanently unavailable. See, e.g., Commonwealth v. Kontos, 442 Pa. 343, 276 A.2d 830 (1971); Lewis v. Lebanon Court of Common Pleas, supra; Commonwealth v. Robinson, 229 Pa. Superior Ct. 131, 324 A.2d 441 (1974); Commonwealth v. Walak, 228 Pa. Superior Ct. 404, 323 A.2d 886 (1974).[7] Where the evidence requested no longer exists, however, no discovery rules have yet been adopted or sanctions imposed in this Commonwealth that would suggest a reversal is mandated. The federal procedure is particularly inapplicable in a case such as the one before us where the evidence is physical, and impermanent by its nature, unlike recorded statements of witnesses.[8]

The victim in the present case died on August 18, 1971, in the Ashland General Hospital. Regular hospital reports were kept and the doctors who attended the victim were available to testify. An autopsy was performed

[7] Other jurisdictions have adopted an approach similar to that in the federal courts when evidence has been destroyed by the prosecution. See, e.g., People v. Hitch, 12 Cal. 3d 641, 527 P. 2d 361, 117 Cal. Rptr. 9 (1974); Birkla v. State, Ind. , 323 N.E. 2d 645 (1975); City of Seattle v. Fettig, 10 Wash. App. 773, 519 P. 2d 1002 (1974).

[8] Where physical evidence is not available for trial, this Court has always held that "there exists no such rule as expounded by the defendant which would automatically necessitate his acquittal upon the Commonwealth's failure to produce physical evidence shown to be unavailable." Commonwealth v. Cromartie, 222 Pa. Superior Ct. 278, 280, 294 A.2d 762, 763 (1972). It has been suggested that the Commonwealth has a burden of establishing the unavailability of the evidence in such cases. Commonwealth v. McGlory, 226 Pa. Superior Ct. 493, 313 A.2d 326 (1973).

there by a resident pathologist who drew up an autopsy report indicating his findings. This doctor was available to testify. Parts of the victim's body were preserved and sent to laboratories for further analysis. Slides for microscopic study were made from some of the body tissue imbedded in paraffin. The doctors who analyzed the tissue were called to testify. Finally, after all the final reports had been concluded, the actual body tissue and some of the paraffin imbedded tissue was routinely destroyed by a medical laboratory on January 14, 1972, five months after the victim's death. Ten days later, on January 24, 1972, a preliminary hearing was held. Counsel for the defense indicated that it was at the preliminary hearing that he first orally requested medical information and evidence. The actual written motion for pretrial discovery specifically requesting autopsy specimens was not filed until August 14, 1973.

At the hearing on the motion for discovery, the Commonwealth cooperated fully with the defense, agreeing to permit inspection of all the hospital records, the slides made from body tissue, all of the paraffin imbedded tissue that had been retained by the laboratory, in fact everything the Commonwealth's witnesses had except body fluids and the actual parts of the victim's body. Furthermore, the doctor who had chemically analyzed the blood and tissue taken from the body was made available to confer with the defense and its expert prior to trial. Of course, all the doctors were subject to cross-examination at trial.

When all these factors are taken into consideration, it is apparent that the Commonwealth has not overborne

the defendant by secretly amassing evidence or designing a case unfairly weighted against him. The good faith of the Commonwealth is attested to by the willingness with which it agreed at the hearing to make available its evidence and witnesses relevant to the cause of death. The validity of the findings can be tested by the defense by examination of the slides, remaining imbedded tissues, and hospital records as well as by cross-examination at trial of the prosecution's six expert witnesses. See Commonwealth v. Cromartie, 222 Pa. Superior Ct. 278, 294 A.2d 762 (1972). Furthermore, the delay by the defense in requesting the evidence in writing, in a manner consistent with Pa. R. Crim. P. 310, left the lower court no choice but to proceed to trial without the lost evidence, relying on the ample evidence which could still be discovered.

Appellant also contends that the charge of involuntary manslaughter should have been dismissed when the Commonwealth failed to prove its original theory of misdemeanor manslaughter. It is pointed out that the Commonwealth had originally brought two charges against the appellant: involuntary manslaughter[9] and practicing medicine without a license.[10] The Commonwealth initially sought to prove that the death occurred during the

[9] Act of June 24, 1939, P. L. 872, §703, 18 P.S. §4703 (1963) *repealed*, Act of December 6, 1972, P. L. , No. 334, §5. This section reads in part: "Whoever is convicted of involuntary manslaughter, happening in consequence of an unlawful act, or the doing of a lawful act in an unlawful way, is guilty of a misdemeanor. . . ."

[10] Act of June 3, 1911, P. L. 639, §2, *as amended*, 63 P.S. §401a (1968).

perpetration of the unlawful act of practicing medicine without a license. At the conclusion of the prosecution's case, however, the charge of practicing medicine was dismissed. Thus, it is appellant's feeling that the involuntary manslaughter charge should also be dismissed.

Involuntary manslaughter can be found where the conduct causing death is either unlawful in itself, or done in such a rash and criminally negligent manner as to be deemed reckless. This Court has frequently stated the degree of recklessness required: "Where, as here, the act causing death is not in itself unlawful, to make it criminal the negligence of the defendant must be such a departure from prudent conduct as to evidence a disregard of human life or an indifference to consequences." Commonwealth v. Zeringo, 214 Pa. Superior Ct. 300, 302, 257 A.2d 692, 693 (1969). See also Commonwealth v. Feinberg, 433 Pa. 558, 253 A.2d 636 (1969); Commonwealth v. LaPorta, 218 Pa. Superior Ct. 1, 272 A.2d 516 (1970). In the present case, much evidence was introduced to show that the appellant's acts in administering such a strong dosage of potassium iodide to the victim was a rash and reckless act. One expert testified that, in his opinion, the concentration of the chemical when it was first injected was between seven and eight percent. In that concentration, potassium iodide is a corrosive substance which could cause cardiac arrest, collapse of the circulatory system, and coagulation of protein molecules in the body tissue causing hemorrhaging into the coagulated areas. Other medical experts stated that potassium iodide was never, in their experience, used to procure an abortion. Furthermore, there was sufficient evidence connecting Wayne Mace with the death, including his own admis-

sion to the doctor who was called when Mrs. Maley first collapsed, stating that he had administered the solution. On these facts, it was clearly within the jury's province to find that appellant, a layman, had recklessly administered a corrosive substance to a person, attempting to produce an abortion, which instead killed her.

Judgment of sentence affirmed.

Watkins, P.J., Hoffman, Cercone, Price and Van Der Voort, JJ. join in this opinion. Spaeth, J. files a concurring opinion in which Hoffman, J. joins.

APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 114 March Term, 1974

Commonwealth of Pennsylvania

v.

Wayne McArthur Mace, Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division of Dauphin County, at No. 116 C.D. of 1973.

Concurring Opinion by Spaeth, J., filed Jun 24, 1975:

I believe that when the prosecutor anticipates offering testimony based on physical evidence, he has a duty to preserve that evidence. Only by preserving the evidence can it be made available for pretrial discovery, if appropriate, *see* Pa. R. Crim. P. 310, and for production at trial. See Commonwealth v. Kontos, 442 Pa. 343, 276 A.2d 850 (1971). As Judge Spaulding stated in his concurring opinion in Commonwealth v. Cromartie, 222 Pa. Superior Ct. 278, 282, 294 A.2d 762, 764 (1972):[1]

[1] Hoffman and Cercone, JJ., joined in this concurring opinion.

> [A]llowing the state to bring in testimony based on physical evidence within its exclusive control while denying a defendant the opportunity to examine physical evidence amounts to a denial of due process when the opportunity to examine is crucial to defendant's ability to effectively impeach or contradict the state's witness, and when the physical evidence operates to establish an element of the crime or a direct link between the defendant and the crime alleged.

In the present case, the failure to preserve the autopsy specimens appears to have done appellant no harm. For that reason, I concur in affirming the judgment of sentence.

Hoffman, J., joins in this opinion.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA

No. 1136 Criminal Division 1973

Commonwealth of Pennsylvania

v.

Wayne McArthur Mace

OPINION

The Defendant Wayne McArthur Mace was found guilty by a jury on the charge of involuntary manslaughter.[1] A demurrer was sustained to a charge of practicing medicine without a license and prior to the trial the Commonwealth had dropped charges of abortion causing death. The Defendant has filed Motions for New Trial and in Arrest of Judgment.

[1] Trial before Judge Richard B. Wickersham and a jury commencing Tuesday, October 2, 1973; Richard L. Guida, Esquire, Deputy District Attorney for the Commonwealth and Bruce E. Cooper, Esquire for the Defendant.

The evidence at trial indicated that on August 18, 1971, Mrs. Mildred Maley died as a result of shock directly caused by the introduction of a potassium iodide abortifacient into her uterus (N.T. 247-8). The victim died about 48 hours after her admission to the Ashland State General Hospital (N.T. 98 and 124).

The decedent had arrived at the Williamstown residence of the Defendant and his parents on Sunday, August 15, 1971. Shortly after 11:00 p.m., Mrs. Maley became nauseous and after a brief rest collapsed. The Defendant, the Defendant's father Mr. Harry Mace, and Mr. Paul Anthony, the decedent's employer and friend who had been called earlier by the decedent and asked to meet her at the Mace residence, attempted to revive her. As Mr. Harry Mace was unable to locate a doctor in the area, Mr. Anthony called Dr. Lewis Gabriel at his residence in Ashland for assistance. At the trial Dr. Gabriel testified that Mr. Anthony had told him a woman "was pregnant and something was done to her" (N.T. 87). Dr. Gabriel further testified as follows:

> "A. Well, then I said 'Are you still at the place where it was done? He said 'Yes'. I said, 'Could I speak to the person that did it?'. And I said 'Yes'. After a brief pause this gentleman came to the phone and I asked him what had been done and he said that potassium iodide had been injected into the uterus." (N.T. 87-88.)

The Defendant admitted speaking to Dr. Gabriel immediately after Mr. Anthony. Dr. Gabriel testified as follows regarding his conversation with the Defendant:

> "A. I said 'What happened?' He says 'After I injected the medicine she complained of severe pain and then she became unconscious. . . .' " (N.T. 89.)

Following Dr. Gabriel's instruction, Mr. Anthony drove the decedent to the Ashland State General Hospital.

The Defendant testified during the trial in his own defense that the only information he related to Dr. Gabriel was that which he received from Mr. Anthony and his father who testified that prior to her collapse, the decedent had told him of her pregnancy and the details of her abortion.

Defendant's averments Nos. 1-5 and 11 as outlined in his Motions for New Trial and In Arrest of Judgment are without merit.[2] 18 P.S. §4703 provides, in pertinent part as, follows:

> "Whoever is convicted of involuntary manslaughter, happening in consequence of an unlawful act, or the doing of a lawful act in an unlawful way, is guilty of a misdemeanor, and shall be sentenced to pay a fine not exceeding two thousand dollars ($2,-

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[2] "1. The verdict is contrary to the evidence.
"2. The verdict is contrary to the weight of the evidence.
"3. The verdict is contrary to the law.
"4. The charge of the Court was contrary to the evidence.
"5. The charge of the Court was contrary to the law.
• • •
"11. The Court erred in refusing to dismiss the charge of involuntary manslaughter after the charge of practicing medicine without a license was dismissed, since no evidence was presented which allowed the jury to find that the alleged act was performed in a wanton and reckless manner."

000) or to undergo imprisonment not exceeding three (3) years, or both."

The Pennsylvania Superior Court, speaking through Judge Watkins said in Commonwealth v. LaPorta, 218 Pa. Superior Ct. 1, (1970) at page 9:

> "Where the act itself is not unlawful, that is contrary to law, then to make it criminal, 'the negligence must be such a departure from what would be the conduct of an ordinary, prudent or careful man under the same circumstances as to evidence a disregard of human life or an indifference to consequences.' Commonwealth v. Aurick, 342 Pa. 282, 288-89, 19 A. 2d 920 (1941). The court in Aurick further said at page 285, that the recklessness of conduct causing death must amount to unlawfulness. . . .
>
> "Recklessness means a certain state of consciousness with reference to the consequences of one's acts and it depends on the actual condition of the defendant's mind with regard to consequences. Commonwealth v. Balanzo, 261 Pa. 507, 104 A. 683 (1918)."

As was stated in Commonwealth v. Zeringo, 214 Pa. Superior Ct. 300, (1969) at 302:

> ". . . Where, as here, the act causing death is not in itself unlawful, to make it criminal the negligence of the defendant must be such a departure from prudent conduct as to evidence a disregard of human life or an indifference to consequences. . ."

A more succinct explanation of the elements of involuntary manslaughter where a per se unlawful act is not

present can be found in Commonwealth v. Hartle, 200 Pa. Superior Ct. 318 (1963), at 324:

> "In Commonwealth v. Root, 403 Pa. 571, 170 A. 2d 310, our Supreme Court pointed out that there are two essential and separate elements in the crime of involuntary manslaughter (a) reckless conduct on the part of the accused, and (b) a direct causal connection between that reckless conduct and the ensuing death. . . ."

The Commonwealth is not required in an involuntary manslaughter case to elect between the two theories of culpability. Commonwealth v. Patrick, 79 York L. Rec. 93 (1965). The Pennsylvania Supreme Court has delineated the requirements to be met for sustaining an involuntary manslaughter conviction pursued on the lawful act theory employed here by the Commonwealth:

> ". . . When a death results from the doing of an act lawful in itself but done in an unlawful manner, in order to sustain a conviction for manslaughter the Commonwealth must present evidence to prove that the defendant acted in a rash or reckless manner. Commonwealth v. Ushka, 130 Pa. Superior Ct. 600, 603, 198 A. 465 (1938): Commonwealth v. Gill, 120 Pa. Superior Ct. 22, 31, 182 A. 103 (1935). The conduct of the defendant resulting in the death must be such a departure from the behavior of an ordinary and prudent man as to evidence a disregard of human life or an indifference to the consequences. Commonwealth v. Hartle, 200 Pa. Superior Ct. 318, 324, 188 A. 2d 798 (1963). Furthermore, there must be a direct causal relationship between the de-

> fendant's act and the deceased's death. Commonwealth v. Root, 403 Pa. 571, 170 A. 2d 310 (1961); Commonwealth v. Comber, 374 Pa. 570, 581, 97 A. 2d 343 (1953)." Commonwealth v. Feinberg, 433 Pa. 558, (1969) at 566.

At the trial, the Commonwealth linked the Defendant and the insertion of potassium iodide into the decedent by the testimony of Dr. Gabriel. Several expert witnesses testified that the cause of death was ultimately due to the introduction of that abortifacient into the uterus of the decedent. Finally, the jury had sufficient evidence to conclude that the use of potassium iodide for the purpose of abortion is a reckless act. Dr. Robert Catherman, forensic pathologist and Deputy Medical Examiner for the City and County of Philadelphia testified that potassium iodide "is not an abortifacient used in . . . authorized, recognized, safe medical practice." (N.T. 249.) Moreover, the fact that the Defendant, who is not a licensed doctor, performed such a dangerous medical procedure upon the decedent is evidence from which a jury could reasonably infer a reckless disregard for the safety of the victim.

Defendant's point No. 10[3] is also clearly without merit. Applications for continuance in a criminal case are addressed to the sound discretion of the trial judge whose action will not be disturbed in the absence of a manifest abuse of discretion. Commonwealth v. Niemi, 365 Pa. 105, (1950). We see no abuse of discretion here where the trial was held more than two years after initial charges

[3] "10. The Court erred in refusing to grant a continuance to the defendant in order to allow his expert medical witnesses sufficient time to review the evidence."

were filed and more than one year after defense counsel learned that discovery proceedings would be necessary to gain access to certain medical records.

The law regarding Defendant's points Nos. 6 and 7[4] is well settled. A bad indictment is no bar to a prosecution upon a good one. U. S. v. Oppenheimer et al., 242 U. S. 85, (1916). "Even the pendency of another indictment for the same offense is no bar to a subsequent indictment." Commonwealth v. Kelly, 14 Bucks Co. L. Rep. 132 (1964). Concisely stated, the law is:

> "Several indictments may be found and prosecuted for different offenses, although they relate to the same transaction. It is also well settled that the fact that an indictment is pending does not prevent the finding of another indictment for the same act as constituting another or a higher or lesser offense." 42 C.J.S. Indictments and Information §34b.

In regard to point No. 8,[5] the rule enunciated in Commonwealth v. Campana, 452 Pa. 233 (1973), requires only that all charges resulting from the criminal episode be consolidated at one trial. There is no prohibition against more than one indictment being issued so long

[4] "6. The Court erred in not quashing the indictment because the Abortion Causing Death Statute has been declared unconstitutional.

"7. The Court erred in not quashing the indictment because involuntary manslaughter is a lesser offense under the charge of abortion causing death."

[5] "8. The Court erred in not quashing the indictment for the reason that the defendant has been placed in double jeopardy as all charges arising from the same occurrence must be brought together."

as all charges arising from the same criminal transaction are *tried* together.

In regard to point No. 9,[6] the autopsy specimens destroyed in good faith and in accord with the normal practice of the National Medical Services Lab, Willow Grove, Pennsylvania. The tissues were destroyed on January 14, 1972—almost six months after Mrs. Maley's death (N.T. 212.) On the authority of U. S. v. Bryant, 439 F. 2d 642 (D. C. Cir., 1971) Defendant argues that the destruction of the autopsy samples has infringed his constitutional right of due process. However *Bryant* explicitly deals with the federal statutory provisions of the Jencks Act and the Federal Rules of Criminal Procedure but not with the constitutional right of due process. As the U.S. Supreme Court has stated:

> ". . . our *Jencks* decision and the Jencks Act were not cased in constitutional terms. [Citation omitted.] They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials." *United States v. Augenblick,* 393 U.S. 348 (1969), at 356.

Since the Commonwealth has not evidenced any bad faith in this matter and has given an adequate explanation, the Commonwealth has met its constitutional burden (United States v. Augenblick, supra) and "in the absence of bad faith or connivance on the part of the government, destruction of evidence prior to trial does not necessitate reversal

[6] "9. The Court erred in not quashing the indictment because the autopsy samples taken from the body of the deceased were destroyed by the Commonwealth."

of a conviction." U. S. v. Henry, 487 F. 2d 912 (9th Cir. 1973).

Defendant's last contention[7] is that the trial court erred in admitting expert testimony based on, in part, the destroyed autopsy specimens. Although it is the general rule in Pennsylvania that an expert cannot express a conclusion based on facts not in evidence [Murray v. Siegal, 413 Pa. 23 (1963)], the Pennsylvania Supreme Court made a specific exception to this rule and permitted medical witnesses to express opinion testimony on medical matters based, in part, upon reports of others which are not in evidence. See, Commonwealth v. Thomas, 444 Pa. 436 at 445 (1971). The Thomas court explained its exception by citing Wigmore who wrote that " 'where the information is that of an attending nurse or physician having personal observations and an interest in learning and describing accurately, there seems to be every reason for admitting testimony based in part on this.' 3 Wigmore, Evidence §688(4) (Chadbourn Revision)." Commonwealth v. Thomas, supra. Clearly, the policy reasons enunciated in Thomas apply here to the testimony of the toxicologist and forensic pathologist who based their expert medical opinions on the destroyed specimens as well as on the autopsy and hospital reports admitted into evidence.

The applicability of the Murray rule to expert testimony based on missing physical objects has never been

[7] "12. The Court erred in overruling the defendant's objection to expert medical testimony presented by the Commonwealth as to the cause of death after it was established that the evidence upon which said opinions were based, were [was] destroyed."

decided in Pennsylvania. Other jurisdictions have considered the question and have permitted expert testimony based on missing physical evidence. State v. Michael, 107 Ariz. 126, 483 P. 2d 541 (1971). Gedicks v. State, 62 Wis. 2d 74, 214 N.W. 2d 569, (1974).

On Wednesday, October 17, 1973, following the jury conviction of involuntary manslaughter and filing of the aforementioned Motions for New Trial and in Arrest of Judgment, oral argument was heard thereon by the trial judge under provisions of Rule 1123(e) of the Pennsylvania Rules of Criminal Procedure. Following oral argument, the Motions for New Trial and in Arrest of Judgment were denied. Thereafter the Defendant was sentenced under the provisions of the Pennsylvania Penal Code of 1939, 18 P.S. §4303, to pay a fine of $2,000 to the Commonwealth, costs of prosecution, and to undergo imprisonment in a State institution for an indeterminate time the minimum of which shall be 1½ years and the maximum of which shall be 3 years. Defendant has now taken an appeal to the Pennsylvania Superior Court to No. 114 March Term, 1974 and this Opinion is rendered by the trial court under and pursuant to Rule 46 of the Pennsylvania Superior Court Rules.

By the Court:
Richard B. Wickersham,
J.

June 28, 1974

APPENDIX D

SUPREME COURT OF PENNSYLVANIA
Middle District

Sally Mrvos
Prothonotary
Jane C. Reed
Deputy Prothonotary

Harrisburg 17120
September 22, 1975

Bruce E. Cooper, Esquire
Cooper, Friedman & Butler
2 North Market Square
Harrisburg, Pa. 17108

Re: Com. v. Mace, Apt.
(No. 114 March Term, 1974—Superior Ct.)
No. 196 Allocatur Docket

Dear Sir:

Please be advised the Court entered the following Orders in the above captioned proceeding:

Petition for Allowance of Appeal

"September 18, 1975.
Petition denied.
Per Curiam."

Petition for Supersedeas

"September 18, 1975
Petition denied.
Per Curiam."

Paper books may be picked up in this office.

Very truly yours,
Jane C. Reed
Deputy Prothonotary

cc—Richard L. Guida, Esq.